VENLEASE I

IBLA 85-411, 85-563 Decided November 10, 1987

Appeals from decisions of the Wyoming State Office, Bureau of Land Management, rejecting simultaneous oil and gas lease applications M-62604 and W-92485.

Affirmed.

1. Administrative Procedure: Administrative Procedure Act -- Administrative Procedure: Rulemaking -- Oil and Gas Leases: Applications: Drawings -- Regulations: Force and Effect as Law

   A notice published in the Federal Register, wherein BLM interprets and clarifies existing regulations to ensure compliance with regulatory provisions at 43 CFR 3102.5, is a procedural mechanism exempt from the formal rulemaking requirements of the Administrative Procedure Act, 5 U.S.C. § 553 (1982).

2. Oil and Gas Leases: Applications: Drawings

   BLM may properly reject a simultaneous oil and gas lease application filed on behalf of a partnership if the applicant has not complied with 43 CFR 3112.2-3 by disclosing the identity of all partners on the application or on a sheet accompanying the application, a substantive requirement of the oil and gas leasing program.

3. Notice: Generally -- Regulations: Generally -- Statutes

   All persons dealing with the Government are presumed to have knowledge of relevant statutes and duly promulgated regulations.

APPEARANCES: Jason R. Warran, Esq., Washington, D.C. for appellant.

OPINION BY ADMINISTRATIVE JUDGE FRAZIER

Venlease I has appealed from two decisions of the Wyoming State Office, Bureau of Land Management (BLM), dated January 14, and March 29, 1985, rejecting its simultaneous oil and gas lease applications M-62604 and W-92485.

Appellant's lease applications were drawn with priority for parcels MT-505 (M-62604) and WY-350 (W-92485), respectively, in the October and December 1984 simultaneous oil and gas lease drawings. In its decisions, BLM rejected appellant's lease applications because appellant, a partnership, had failed to disclose the "names of members of the partnership" as other parties in interest on the application forms or accompanying lists, as required by 43 CFR 3112.2-3 and an August 9, 1983, Federal Register notice (48 FR 37656). The fact that appellant is a partnership was disclosed on Part B of the application forms, which stated that Renato Valente was the general partner.

The regulation at issue, 43 CFR 3112.2-3, provides:

> Compliance with Subpart 3102 of this title is required. The applicant shall set forth on the lease application, or on a separate accompanying sheet, the names of all other parties who hold an interest (as defined in § 3000.0-5(k) of this title) in the application, or the lease, if issued.

"Party in interest," in turn, is defined as "a party who is or will be vested with any legal or equitable rights under the lease." 43 CFR 3000.0-5(k).

The August 19, 1983, Federal Register notice states that:

> After August 22, 1983, applications for simultaneously offered parcels received from associations, including partnerships, must be accompanied by a complete list of individuals who are members thereof. This requirement is authorized under 43 CFR 3102.5. [1/] By this notice, the Bureau of Land Management formally interprets and exercises its right of demand for this information at the time application is made. Failure by associations or partnerships to comply with this requirement shall result * * * in unacceptability or rejection of the application.

Appellant contends that the BLM decisions rejecting its offers must be reversed because the August 19, 1983, notice imposed a new requirement on applicants without complying with the rulemaking procedures of the Administrative Procedure Act, 5 U.S.C. § 553 (1982), and is therefore invalid as to the requirement to submit a list of members at the time of application. Appellant contends that as an application of 43 CFR 3102.5, which authorizes BLM to request additional information from applicants, the August 19, 1983, Federal Register publication did not afford sufficient public notice.

1/ 43 CFR 3102.5 provides in part: "Anyone seeking to acquire, or anyone holding, a Federal oil and gas lease or interest therein, shall upon demand submit additional information to show compliance with the regulations of this group and the Act." In TXP Operating Co., 99 IBLA 355 (1987), the Board held that pursuant to the Federal Register notice issued under the authority of 43 CFR 3102.5, a limited partnership is required to submit with a simultaneously filed application for an oil and gas lease the names of its general partners and all other parties holding or controlling more than 10 percent of the partnership.

[1] The major question presented in this appeal is whether the Federal Register notice is an "interpretative" or "substantive" rule. It is said that a substantive rule "has the force of law; an interpretative rule is merely a clarification or explanation of an existing statute or rule." Guardian Federal Savings & Loan Association v. Federal Savings and Loan Insurance Corp., 589 F.2d 658, 664 (D.C. Cir. 1978). A substantive rule will be considered to have the "force of law" where it constitutes a substantive modification of an existing regulation, adoption of a new regulation, or a change in policy. W.C. v. Bowen, 807 F.2d 1502, 1504 (9th Cir. 1987); Harry A. Zuckerman, 41 IBLA 372, 379 (1979), and cases cited therein. In the present case, BLM regarded the Federal Register notice as an interpretative rule. BLM stated that the notice "formally interprets" BLM's right to demand information in accordance with 43 CFR 3102.5. 48 FR 37656 (Aug. 19, 1983). However, it is immaterial what "label" an agency puts on an exercise of administrative power. Lewis-Mota v. Secretary of Labor, 469 F.2d 478, 481 (2d Cir. 1972). The determining factor is "what the agency does in fact." Id. at 482. Looking at what the Federal Register notice does in fact, we agree with BLM that it is an interpretative rule.

It is apparent that nowhere in the regulations existing at the time of issuance of the Federal Register notice did BLM specifically require an association applicant to submit a list of its members with its lease application, under penalty of disqualification of the application. However, 43 CFR 3102.5 already provided that associations, by submitting lease applications, thereby certified that its "members" had complied with certain regulatory requirements, and, furthermore, that such applicants "shall upon demand submit additional information to show compliance with [these] regulations." Such "information" would logically include a list of members, where so required by BLM. In addition, in the event that BLM exercised its right to demand information under 43 CFR 3102.5, whether at the time a lease application was submitted or later, 43 CFR 3112.5-1(a) already provided that failure to comply with the requirements of "Subpart 3112," including compliance with "Subpart 3102" (43 CFR 3112.2-3), would result in rejection of a lease application. Moreover, in the event that BLM specifically exercised its right to demand information at the time a lease application was submitted, under 43 CFR 3112.2-1(a) the application would be deemed not "completed * * * pursuant * * * to the regulations in this subpart," including compliance with "Subpart 3102" (43 CFR 3112.2-3), if the required information were not submitted. Thus the application would be subject to rejection under 43 CFR 3112.5-1(a) or a declaration of unacceptability under 43 CFR 3112.3(a). Clearly, disqualification of a lease application in the case of failure to comply with a demand for information under 43 CFR 3102.5 was already a matter of duly promulgated regulations at the time the August 1983 Federal Register notice was issued. That notice served only to exercise BLM's previously announced right to demand information. The actual exercise of the right was neither a substantive modification of an existing regulation nor an adoption of a new substantive regulation. See TXP Operating Co., supra at 360; Harry A. Zuckerman, supra; See also Cambridge Mining Co., 74 IBLA 26 (1983); Peabody Coal Co., 53 IBLA 261 (1981).

In view of the fact that the Federal Register notice merely clarifies existing regulations, formal rulemaking was unnecessary to satisfy the primary purposes behind 5 U.S.C. § 553 (1982). Cf. British Caledonian Airways, Ltd. v. Civil Aeronautics Board, 584 F.2d 982, 989-991 (D.C. Cir. 1978); American Bancorporation, Inc. v. Board of Governors of Federal Reserve System, 509 F.2d 29, 34-35 (8th Cir. 1974). The notice operates merely as a rule of procedure to ensure compliance with the other regulatory provisions set forth in 43 CFR 3102.5, and contains "no new substantive matter." See Schupak v. Califano, 454 F. Supp. 105, 115 (E.D.N.Y. 1978). See also, Thomas v. State of N.Y., 802 F.2d 1443, 1446 fn. (D.C. Cir. 1986).

[2] The Turner Association, 85 IBLA 374 (1985), aff'd, The Turner Association v. Hodel, CV 85-196 BLG-JFB (D. Mont. Sept. 1986), is one of several recent cases 2/ involving 43 CFR 3112.2-3 and the August 19, 1983, Federal Register notice, quoted supra. In these cases the Board affirmed BLM decisions rejecting applications that were not accompanied by a list of members of an association or partnership. As we stated in Turner, BLM properly exercises its authority under 43 CFR 3102.5 in requiring an applicant to submit information to show compliance with the regulations related to citizenship, acreage holdings and prohibited arrangements. BLM stated the purpose of strict enforcement of the regulation at 43 CFR 3112.2-3 is "to preserve the integrity of the simultaneous oil and gas leasing program by ensuring against multiple filings on a single parcel as prohibited by amended § 3112.5-1." 48 FR at 37656. The policy and enforcement notice published at 43 FR 37656 defined partnerships to be among those entities which must identify their members. Thus, where an association applicant or partner has not complied with the provisions of 43 CFR 3112.2-3 by disclosing the identity of all members or partners on the application or on a sheet accompanying the application, BLM may properly reject the application.

The dissenting opinion views the Federal Register notice as imposing a requirement not previously contained in the regulations without complying with 5 U.S.C. § 553 (1982). Based solely on its analysis of the notice, the dissent recommends overruling Turner, supra, and the cases cited in note 2, which serve as precedent for our decision herein. In these cases, however, the issue whether the Federal Register notice was an interpretative or a substantive rule was not addressed. We must also be aware that lessees and BLM may have taken actions in reliance on our determinations in these decisions. In the absence of clear error, these decisions should be adhered to, assuring certainty, stability, and uniformity in the application of the law. It is only where subsequent review demonstrates clear error in our earlier work that we must overrule it. See e.g., Shaw Resources, Inc., 79 IBLA 153, 91 I.D. 122 (1984).

[3] Appellant's argument respecting notice is devoid of merit. All persons who deal with the Government are presumed to have knowledge of relevant statutes and duly promulgated regulations. An applicant is deemed to

2/ These cases are W.O.I.L. Associates, 85 IBLA 394, (1985); BTA Oil Producers, 91 IBLA 268 (1986); Kerogen Crushers, 95 IBLA 63 (1986); R.G.B. Co., 95 IBLA 300 (1987).

have knowledge of 43 CFR 3112.2-3 and the requirement that association applications must be accompanied by a complete list of members because both were published in the Federal Register, and were, therefore, a matter of public record. 44 U.S.C. § 1507 (1982); Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380 (1947); Ward Petroleum Corp., 93 IBLA 267 (1986).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decisions appealed from are affirmed.

Gail M. Frazier
Administrative Judge

I concur:

Wm. Phillip Horton
Chief Administrative Judge

ADMINISTRATIVE JUDGE IRWIN DISSENTING:

At the outset certain fundamentals should be made clear. A partnership of U.S. citizens may hold an oil and gas lease. 43 CFR 3102.1. The regulation cited in BLM's decisions, 43 CFR 3112.2-3, does not require a partnership to set forth its members as "other parties who hold an interest * * * in the application." 1/ Members of a partnership are not automatically parties who hold an interest. 2/ A partnership may hold interests in property in its own name as a legal entity that is separate from its members. 3/ It is only the August 19, 1983, Federal Register notice, 4/ which is based on 43 CFR 3102.5, 5/ that requires an association or partnership to submit a complete list of its members with its application. The Turner Association, 85 IBLA 374, 376 (1985). 6/

The Administrative Procedure Act, 5 U.S.C. § 551(4) (1982), defines a "rule" as "an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency * * *." A "rulemaking" is the "agency process for formulating, amending, or repealing a rule." 5 U.S.C. § 551(5) (1982). 5 U.S.C. § 553(b) and (c) (1982) requires publication of a general notice of proposed rulemaking in the Federal Register and, after that, an opportunity for interested persons to participate in the rulemaking through submission of written data, views, or arguments. Under section 553(d) the publication required by section 552(a)(1)(D) of a substantive rule must be made not less than 30 days before its effective date, but interpretative rules and statements of policy are excepted.

1/ 43 CFR 3112.2-3 provides:

"Compliance with Subpart 3102 of this title is required. The applicant shall set forth on the lease application, or on a separate accompanying sheet, the names of all other parties who hold an interest (as defined in § 3000.0-5(k) of this title) in the application, or the lease, if issued."

"Party in interest" is defined as "a party who is or will be vested with any legal or equitable rights under the lease." 43 CFR 3000.0-5(k).

2/ If the partnership agreement gives any of its members an interest in a lease, as defined by 43 CFR 3000.0-5(1), then the partnership would have to name such members under 43 CFR 3112.2-3. See Emery Energy Inc., 90 IBLA 70 (1985).

3/ Tiffany on Real Property (3rd ed.), § 443.

4/ 48 FR 37656 (Aug. 19, 1983).

5/ 43 CFR 3102.5 provides in part: "Anyone seeking to acquire, or anyone holding, a Federal oil and gas lease or interest therein, shall upon demand submit additional information to show compliance with the regulations of this group and the Act."

6/ As The Turner Association states, that notice omits the word "other" from its paraphrasing of the 43 CFR 3112.2-3 requirement that an applicant must designate all other parties who hold an interest in the application. 85 IBLA at 375. The notice also speaks of BLM's intention to "strictly enforce the provisions of amended 3112.2-3." Neither of these statements in the notice, however, should be understood as meaning that 3112.2-3 itself requires a partnership or association to submit a list of members with its application.

By its terms, section 553 does not apply to "a matter relating to * * * public property." 5 U.S.C. § 553(a)(2) (1982). 7/ As a matter of policy, however, the Department has stated it will "utilize to the fullest extent possible the public participation procedures of 5 U.S.C. § 553." 36 FR 8336 (May 4, 1971). A similar statement of policy, 36 FR 2532 (Feb. 5, 1971), has been held binding on an agency. Herron v. Heckler, 576 F. Supp. 218, 229-30 (N.D. Cal. 1983). See also Batterton v. Marshall, 648 F.2d 694, 700 (D.C. Cir. 1980); Rodway v. U.S. Department of Agriculture, 514 F.2d 809, 814 (D.C. Cir. 1975). The Department is thus bound to follow section 553 procedures in rulemakings related to public property. 8/

Section 553(b) also provides an exception from its rulemaking procedures 9/ for "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice." 5 U.S.C. § 553(b)(A) (1982). "Interpretative rules" have been defined as "statements issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers." 10/ They have been distinguished from substantive (or "legislative") rules, i.e., rules that are not excepted from section 553 rulemaking procedures, as follows: "`legislative rules' are those which create law, usually implementary to an existing law; whereas interpretative rules are statements as to what the administrative officer thinks the statute or regulation means." 11/

7/ This exception does not apply to rules implementing the Federal Land Policy and Management Act of 1976. 43 U.S.C. § 1740 (1982).

8/ See Rowell v. Andrus, 631 F.2d 699 (10th Cir. 1980); Harry A. Zuckerman, 41 IBLA 372, 377 (1979), aff'd, Zuckerman v. Civiletti, Civ. No. 79-815-M (D.N.M. Jan. 13, 1981), rev'd on other grounds, Civ. No. 81-1323 (10th Cir. Oct. 6, 1983).

9/ It has been suggested that the reference to "this subsection" in section 553(b) is misleading, since the exception for such rules would also apply to section 553(c) procedures. Administrative Conference of the United States, A Guide to Federal Agency Rulemaking (1983) at 31 n.71.

10/ U.S. Department of Justice, Attorney General's Manual on the Administrative Procedure Act (1947) at 30 n.3.

11/ Gibson Wine Co. v. Snyder, 194 F.2d 329, 331 (D.C. Cir. 1952). "An interpretative rule is a clarification or explanation of an existing regulation, rather than a substantive modification thereof or the adoption of a new regulation." (Emphasis in original.) Harry A. Zuckerman, supra note 8, at 379.

See also Citizens to Save Spencer County v. EPA, 600 F.2d 844, 876 (D.C. Cir. 1979):

"This court has noted even more recently that an interpretative rule is an `administrative construction of a statutory provision on a question of law reviewable in the courts,' and that `[i]nterpretative rules, unlike the quasilegislative rules which are subject to the prescriptions of § 553 [of the APA], are merely an agency's interpretation of a statute it is charged with implementing and create no law and have no effect beyond that of the statute.' * * * We also find of relevance here the distinction we drew in another case between agency action that imposes new duties and that which simply `reminds' affected parties of existing duties." (Citations omitted.)

"General statements of policy * * * advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power." 12/ Unlike a substantive rule, which "establishes a standard of conduct which has the force of law," a general statement of policy

> does not establish a "binding norm." It is not finally determinative of the issues or rights to which it is addressed. The agency cannot apply or rely upon a general statement of policy as law because a general statement of policy only announces what the agency seeks to establish as policy. [13]

General statements of policy "impose no rights or obligations and have no substantial impact on affected members of the public." 14/

Finally, a rule "of agency organization, procedure, or practice" "covers agency actions that do not themselves alter the rights or interests of parties, although it may alter the manner in which the parties present themselves or their viewpoints to the agency * * *. The exemption cannot apply, however, where the agency action trenches on substantial private rights and interests." 15/ Agency rules that "detail the procedures and methods to be used in executing any inquiry * * * rules of evidence, the manner and date for filing pleadings, and the delegation of basic duties" fall within this exemption from rulemaking procedures. 16/

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fn. 11 (continued)
See also Chrysler Corp. v. Brown, 441 U.S. 281, 312-16 (1979); Shell Offshore, Inc., 96 IBLA 149, 169-72, 94 I.D. 69, 81-83 (1987).
Whether a rule has a substantial impact is not helpful in distinguishing interpretative from legislative rules, since both may have that effect. See Cabais v. Egger, 690 F.2d 234, 237-38 (D.C. Cir. 1982). 12/ U.S. Department of Justice, Attorney General's Manual on the Administrative Procedure Act, supra note 10, at 30 n.3.
13/ Pacific Gas & Electric Co. v. FPC, 506 F.2d 33, 38 (D.C. Cir. 1974). "An administrative agency has available two methods for formulating policy that will have the force of law. An agency may establish binding policy through rulemaking procedures by which it promulgates substantive rules, or through adjudications which constitute binding precedents. A general statement of policy is the outcome of neither a rulemaking nor an adjudication; it is neither a rule nor a precedent but is merely an announcement to the public of the policy which the agency hopes to implement in future rulemakings or adjudications. A general statement of policy, like a press release, presages an upcoming rulemaking or announces the course which the agency intends to follow in future adjudications."
Id. (citations omitted). See also Amrep Corp. v. FTC, 768 F.2d 1171, 1178 (10th Cir. 1985).

14/ Mezines, Stein, Gruff, 3 Administrative Law § 15.07[4] (1987).
15/ Batterton v. Marshall, supra at 707-08.
16/ Mezines, Stein, Gruff, 3 Administrative Law, supra note 14, § 15.07[5].

In general, the exemptions from section 553 rulemaking procedures are "narrowly construed and only reluctantly countenanced." 17/ And where a rule not exempt from these procedures is adopted without complying with them, it is invalid. 18/

It is not a matter of doubt that the August 19, 1983, notice is a "rule" within the recognized scope of the definition in 5 U.S.C. § 551(4) (1982). It has particular applicability to association and partnership applicants for oil and gas leases, had a future effect (4 days after it was published), and implemented the Mineral Leasing Act. Indeed, both BLM, in the decisions under review, and the Board, in The Turner Association, supra, have referred to the notice, respectively, as a "regulation" and a "rulemaking." Nor is it doubted that BLM did not publish notice of its contents as a proposed rulemaking, provide an opportunity for interested persons to submit their views about it, or publish it not less than thirty days before its effective date. 5 U.S.C. § 553(b)-(d) (1982).

It is, however, also clear that the notice does not fit within any of the exceptions to section 553 rulemaking procedures. Although it is labelled a "rule related notice" 19/ and says it "formally interprets" 43 CFR 3102.5, it imposes a new requirement on association and partnership applicants, namely, to submit lists of their members with their applications, and also imposes a sanction for failure to comply with this requirement, namely, the unacceptability or rejection of such applications. 20/ In the language of the cases reviewed above, the notice "creates law," "imposes new duties," "establishes a standard of conduct which has the force of law," and "alters the rights and interests of parties." Before it was published, BLM could demand (as it still can) that an applicant submit additional information to show compliance with the regulations and the Act under 43 CFR 3102.5; afterwards it could reject any application not accompanied by the required list without making any demand.

17/ New Jersey v. United States Environmental Protection Agency, 626 F.2d 1038, 1045 (D.C. Cir. 1980); American Federation of Government Employees, AFL-CIO v. Block, 655 F.2d 1153, 1156 (D.C. Cir. 1981). See also Credit Union National Association v. National Credit Union Administration Board, 573 F. Supp. 586, 591 (D.D.C. 1983).

18/ Hotch v. United States, 212 F.2d 280, 283-84 (9th Cir. 1954); City of New York v. Diamond, 379 F. Supp. 503, 516 (S.D.N.Y. 1974); Anderson v. Butz, 428 F. Supp. 245, 251 (E.D. Cal. 1975), aff'd, 550 F.2d 459, 462 (9th Cir. 1977); Sannon v. United States, 460 F. Supp. 458, 468 (S.D. Fla. 1978); D & W Food Centers, Inc. v. Block, 786 F.2d 751, 757 (6th Cir. 1986); Milton D. Feinberg (On Reconsideration), 40 IBLA 222, 230-31 n.1, 86 I.D. 234, 238 n.1 (1979), appeal dismissed, Lamp v. Andrus, Civ. No. 80-171-M (D.N.M. July 17, 1981). See 5 U.S.C. § 706(2)(D) (1982).

19/ "[T]he label that the particular agency puts upon its given exercise of administrative power is not * * * conclusive; rather it is what the agency does in fact." Lewis-Mota v. Secretary of Labor, 469 F.2d 478, 481-82 (2d Cir. 1972). See also Anderson v. Butz, supra note 18, 550 F.2d at 463.

20/ It is worth noting that rejection of a partnership's application entails forfeiture of its entire filing fee of $75 per parcel applied for. See Stella O. Redpath, 80 IBLA 174, 178-79 (1984). In this case that amount is $3,900.

The majority acknowledge that BLM's regulations did not (as they still do not) require a partnership to submit a list of its members with its application, or provide that failure to do so will result in rejection of the application. They also acknowledge that it is not what an agency calls its action but what its action does in fact that determines whether the agency must follow prescribed rulemaking procedures in taking its action. Nevertheless, they paste the label "interpretative rule" on BLM's August 19, 1983, notice and say we should follow our previous decisions upholding rejection of applications for failure to comply with that notice because those decisions do not demonstrate clear error. Neither those decisions, nor the Federal district court opinion that affirms one of them, analyze the nature of the BLM notice, however, and cannot serve as a sound foundation for rejecting applications that do not conform to the purported requirement the notice contains. When that notice is measured against the governing law set forth above, it is clear that it imposes a new substantive requirement. Such a requirement cannot have the force and effect of law without having been adopted in accordance with required rulemaking procedures. It is presumably because BLM knows this that it has proposed to amend 43 CFR 3112.2-3 to require that the names of all members of associations or partnership be set forth on the simultaneous lease offer form or on a separate accompanying sheet. 21/

I conclude that the August 19, 1983, notice imposed a requirement that was not previously contained in the regulations without complying with the notice-and-comment and publication requirements of 5 U.S.C. § 553 (1982) and that the requirement is therefore invalid. The January 14 and March 29, 1985, BLM decisions based on this notice should be reversed, and our previous cases upholding rejections of applications of associations and partnerships for failure to submit lists of members overruled.

I dissent.

Will A. Irwin
Administrative Judge

21/ See 52 FR 22599, 22613 (June 12, 1987).